

**OCT 18 2005****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,****Plaintiff-Appellee,****v.****SCOTT LEE MERLO,****Defendant-Appellant.**

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**No. 03-50469****D.C. No. CR-03-00250-NAJ****MEMORANDUM\***

**Appeal from the United States District Court  
for the Southern District of California  
Napoleon A. Jones, District Judge, Presiding**

**Submitted October 11, 2005\*\***

**Before: T.G. NELSON, WARDLAW, and TALLMAN, Circuit Judges.**

**Scott Lee Merlo appeals his 151-month sentence imposed after pleading guilty to bank robbery, in violation of 18 U.S.C. § 2113(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand.**

**Merlo contends that the district court improperly classified him as a career**

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**\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.**

**\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).**

offender under United States Sentencing Guidelines §§ 4B1.1 and 4B1.2(b) based on a non-qualifying predicate conviction for violating California Health and Safety Code § 11379(a). We disagree. Because the judicially noticeable documents relied upon by the court unequivocally established that Merlo was convicted of selling methamphetamines, the district court properly determined that Merlo was a career offender under the Sentencing Guidelines. *See United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246-47 (9th Cir. 2003).

However, because appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error).

**SENTENCE REMANDED.**